

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 25, 2009

ALFONZO PECK v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamilton County
No. 264485 Rebecca Stern, Judge

No. E2009-00779-CCA-R3-PC - Filed February 17, 2010

The Petitioner, Alfonzo T. Peck, appeals the Hamilton County Criminal Court's dismissal of his petition for post-conviction relief. He was convicted by a jury of two counts of aggravated rape, and sentenced as a repeat violent offender to two concurrent terms of life imprisonment without the possibility of parole. On appeal, the petitioner claims he received ineffective assistance of counsel at trial and on appeal. Upon review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., JJ., joined.

Benjamin L. McGowan, Chattanooga, Tennessee, for the Petitioner-Appellant, Alfonzo Peck.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William H. Cox, III, District Attorney General; and William H. Hall, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Facts. The facts of the underlying convictions, as outlined by this court in the petitioner's direct appeal, are described below:

In the late evening hours of September 14, 2002, the victim, Alisa Husband, was walking to her sister's house after playing cards with friends in the Orchard Knob area of Chattanooga. As she crossed a field adjacent to the Carver Recreation Center, she heard a man she did not know yelling at her, but she chose to ignore him. The man continued to pursue the victim, eventually catching up to her and knocking her to the ground with an unknown object. The victim struggled to escape and struck the assailant with a pair of pliers she had in her purse. Despite the victim's efforts, the man overtook her, removed her clothing, and proceeded to penetrate her digitally and to rape her both vaginally and anally.

During this time, Shadrick Lowe was driving his car with Steven Thomas, Antonio Thomas, and Nathan Reese as passengers. Believing that a headlight might be out, Lowe stopped the car to check and heard the victim screaming for help. Lowe detached "The Club," an auto anti-theft device, into two pieces and gave them to Antonio and Steven for protection while the group went to investigate. As they drew closer to the victim's voice, the witnesses observed the assailant on top of the unclothed victim as she pleaded for help. The assailant told the witnesses that he and the victim were married and ordered them to leave, but they refused. Lowe then walked back toward the car to call the police and met Kevin McGowan, a young man living nearby who was leaving his house to attend a friend's party. McGowan allowed Lowe to use his cellular phone to call the police as he cautiously joined the rest of the group. When McGowan got to the scene, the man was leaving and the eyewitnesses informed McGowan that the victim had been raped.

The young men helped the victim gather her clothes and, with the victim's permission, McGowan used his digital camera to take photographs of the injuries to her face. Responding officers Dale Anthony Taylor and Chad Rowe inspected and photographed the crime scene, and recovered a pair of eyeglasses, a wrist watch, and wire cutters, all of which were sent to the Tennessee Bureau of Investigation (TBI) lab for fingerprint analysis. Detective Rowe also collected the disk containing McGowan's digital photographs of the victim. Lowe, McGowan, and Antonio and Steven Thomas all described the assailant to police as middle-aged, between 5'5" and 5'6" tall, and balding.

The victim was transported by ambulance to Erlanger Medical Center, where she was treated for a laceration on her nose and then sent to the Sexual Assault Center for an examination by Breezy Finley, a nurse practitioner. The examination revealed multiple lacerations on the victim's body, ecchymosis (hemorrhaging under the skin), a bite mark between the victim's neck and left shoulder, and injuries consistent with forced vaginal and anal penetration. The victim's injuries were categorized as Levels III and IV on a scale from one to five.

Detective Charles Martin sent the following items to the TBI lab for DNA testing: a rape kit performed on the victim; the clothing of both the victim and defendant; and the wrist watch, glasses, and wire cutters found on the scene. The examination failed to indicate the presence of semen or blood for testing on any of the items; therefore, no DNA evidence was obtained. Additionally, fingerprint analysis of the glasses and face of the watch failed to yield any results.

Approximately eighteen hours after the incident occurred, the defendant telephoned the police to report that his glasses, watch, and \$47 were stolen after he became too intoxicated to drive and left his car unlocked at approximately 8:00 p.m. the night before.

After determining that the description of the perpetrator matched the defendant, Detective Rowe included him in a computer-generated photographic lineup, which was viewed by the victim and all five witnesses. The victim, Steven Thomas, and Shadrick Lowe all unequivocally identified the defendant out of the lineup within ten days of the incident.

Two days after the incident, Investigators Charles Martin and Bill Phillips advised the defendant of his rights, which he waived, and questioned him. During the interview, the defendant contradicted the information given in the telephone report, stating that he had been working on a truck between 8:00 and 9:00 p.m., when he took his watch and glasses off and placed them in the truck. He further indicated that he left the doors unlocked and when he returned, the items had been taken.

At trial, the defendant recanted both prior statements and testified that he and the victim had consensual intercourse. Specifically, he stated that the victim approached and propositioned him in exchange for rock cocaine. He further stated that he paid an individual twenty dollars for the cocaine; that the victim smoked it; and that they had sexual intercourse near Carver Recreational Center. The defendant testified that the victim then “started hollering for more cocaine,” and when he told her he did not have any more money, “she hollered rape.” He stated that he gave the false statement to police because he was afraid of his father, who bought his glasses for him. The defendant testified that, in actuality, the victim took his glasses and his watch and refused to return them to him. Finally, he stated that no one other than him and the victim were present at the scene.

On cross-examination, the defendant admitted that he and his twin brother were convicted of aggravated rape perpetrated in the Orchard Knob area in January 1983. He acknowledged that he was convicted of raping the victim while armed with an ice pick and that the previous victim had multiple bite marks on her back. The defendant stated, however, that there was no DNA evidence linking him with the rape and that he filed a petition for post-conviction relief, which had been denied. He also admitted that he lied to the police in his interview regarding the present case. The defendant stated that after he left the scene, he stayed for two hours at a friend’s house, and then went home to stay with his mother while his father went to work. He reiterated that no one other than he and the victim were on the scene but acknowledged that he was intoxicated at the time and had consumed “about a case” of alcohol. Finally, the defendant testified that he did not know how the victim was injured and denied having any injuries on his hands at the time of his interview with police. Following the presentation of proof, the defendant was convicted as charged and was sentenced to concurrent terms of life without the possibility of release.

State v. Alfonzo Thomas Peck, No. E2005-00342-CCA-R3-CD, 2006 WL 223688, at **1-3 (Tenn. Crim. App., at Knoxville, Jan. 30, 2006), perm. to appeal denied (June 26, 2006).

Post-Conviction Hearing. The petitioner testified that he met with trial counsel about two or three times before trial. He said trial counsel informed him that he was charged with aggravated rape, but she did not tell him that he could receive a life sentence. The petitioner stated that during trial, the State offered a plea agreement for twenty-five years. The petitioner, who is illiterate and has a low IQ, testified that he did not understand the documents pertaining to the plea agreement, and that trial counsel did not explain these documents to him. He also stated that trial counsel did not go through the discovery material with him.

The petitioner testified that he informed trial counsel prior to trial that he had consensual sex with the victim. He denied raping the victim and said he gave the victim cocaine in exchange for sex. The petitioner believed the State had DNA evidence proving that he had sex with the victim. He did not learn until after the trial that the State had no such evidence. The petitioner said he was not aware that the State could question him about his prior conviction for sexual assault. He also said trial counsel did not advise him on whether to testify at trial. The petitioner asserted that trial counsel should have questioned the victim about her criminal record.

Trial counsel testified that many of the State's comments during closing argument were improper. She was surprised that she did not object to the State's closing argument until it was nearly completed. Trial counsel did not recall whether she questioned the victim about her extensive criminal record, which included convictions for theft, forgery, and false impersonation. She also did not recall whether the victim had pending charges at the time of trial.

In preparing for trial, trial counsel testified that she did not hire an investigator. She said she interviewed three of the witnesses to the attack; however, she did not interview the victim. Trial counsel stated that she elected not to present a defense based on consensual sex because of the victim's injuries. She said the petitioner knew he was facing a life sentence because a hearing was held on that matter. Trial counsel stated that she reviewed the discovery material with the petitioner. She said she told the petitioner he received a plea offer for twenty-five years, but the petitioner wanted to go to trial. She said the petitioner knew that evidence of his past conviction could be introduced, and she advised the petitioner not to testify at trial. Trial counsel said the petitioner also knew the State did not have DNA evidence.

Appellate counsel testified that he did not argue prosecutorial misconduct on appeal. He acknowledged that the State's comments during closing arguments were improper; however, he believed the appellate court would find that the comments were harmless. He also believed that asserting prosecutorial misconduct would draw attention away from his primary claim regarding the admissibility of the prior conviction.

In denying the petitioner's claim, the post-conviction court made the following findings with regard to the performance of trial counsel:

The petitioner alleges that trial counsel was ineffective in not objecting to several improper references and statements in the prosecutor's closing argument. Counsel did make one objection to the argument but did not make more because it

was merely argument, not evidence. Considering that the petitioner's own testimony, which was evidence, was inconsistent with the defense of identity, the police report, and the evidence of the victim's lack of consent, the Court finds that any deficiency in counsel's performance in this respect was not prejudicial.

As to the performance of appellate counsel, the post-conviction court stated:

The Court observes that, though similar closing arguments are characteristic of the prosecutor in question, the Court of Criminal Appeals never seems to regard them as grounds for reversal, which leads the Court to the ironic conclusion that the prosecutor regards such arguments as effective at the same time the Court of Criminal Appeals regards them as harmless. Considering that it is the opinion of the higher court that determines the merit of the issue on appeal, which opinion counsel did not mistake, and counsel's unwillingness to dilute the strength of meritorious issues with non-meritorious ones was reasonable, the Court finds no deficiency in counsel's performance in this respect.

ANALYSIS

Standard of Review. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103 (2006). Our supreme court has held:

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotations and citations omitted). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Id.; see also T.C.A. § 40-30-110(f) (2006). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn the evidence." Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to

‘reasonably effective’ assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal citation and quotation omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer’s performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984) and Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim[, and] a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney’s conduct fell below an objective standard of “reasonableness under prevailing professional norms.” Id. (quoting Strickland, 466 U.S. at 688). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “A ‘reasonable probability is a probability sufficient to undermine confidence in the outcome.’” Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

I. Ineffective Assistance of Counsel. The petitioner claims trial counsel was ineffective because she failed to object to a series of remarks made by the State during closing argument. The petitioner also asserts that appellate counsel was ineffective because he did not assert prosecutorial misconduct on direct appeal. In response, the State argues the post-conviction court properly denied relief, as the petitioner failed to prove that either trial or appellate counsel were ineffective.

The petitioner contends trial counsel should have objected to the following remarks during the State’s closing argument:

In [the petitioner’s] mind he is entitled to track down and rape anally and vaginally anyone who is fair game to walk across his domain. This defendant is a very dangerous cat. He is a predator and he was on the prowl back on September the 15th, 2002. His game was horrendously and brutally treated. The injuries she sustained were incredible.

. . .

This defendant was on the prowl and he captured his prey and he dragged her across the field most assuredly as we all stand and sit in this courtroom. . . . This is not a pleasant subject to discuss. But the defendant is a disgusting individual. He is the one that brings us all here. It’s his behavior that causes us all to have to listen to this. He chose to be here by virtue of what he chose to do. And then when he was entangled in the web of what had occurred, he came up with a ludicrous and

incredible story for all of us to swallow, and insulting to anyone of native intelligence, version of what had occurred.

In some ways we apologize that we have to go through this process for a defendant like that but that's our system. Our system entitles him to all the protections that any one of us would want to be afforded in the criminal justice system.

Now did the defendant lie? Repetitively. Did he do it to suit his own ends? Most assuredly. Did he do so to evade prosecution, capture, arrest and conviction? Decidedly so. Will he lie when it will serve his interest? He told us he will. Did he lie to you from this witness stand? Yes, he did. Yes, he did.

Later, trial counsel did object after the State made the following remarks on rebuttal:

The reality is that no matter what we do to protect ourselves, no matter how careful we think we might be, if we examine our lives and we look back at everything we've done, we are all going to remember a time when we felt that twinge. When we look around and say I didn't mean to stop for gas here.

Following trial counsel's objection, the trial court instructed the State to comment only on the facts of the case and the law. The State continued without further objection:

The bottom line is that we like to believe that things can't happen to us. The reason we do it is so we don't have to empathize with a victim. We don't have to put ourselves in a victim's place. Because if we have to empathize with the victim, then we have got to go through this experience with them and we have got to know what it felt like to be tracked down and hunted in this field. We have got to know what it felt like to be knocked senseless and dragged across the open ground. We have got to know what it felt like to be brutalized with the defendant sticking his hand up in our private parts. We have got to know what the indignity of being anally and vaginally raped alternatively would feel like. We have got to feel the victim's pain when she is out in that field minute after minute to the verge of being out there more than thirty minutes with this defendant in a one-on-one gang fight in the dark. Then to have the defendant say to you, do you want to live[?]

The Tennessee Supreme Court has stated that closing argument is a "valuable privilege that should not be unduly restricted." Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn.1978) (citation omitted)). As a result, attorneys have considerable leeway in arguing their positions during closing argument. Id. The closing argument, however, "must be temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried." Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976).

Here, the State made multiple remarks during its closing argument that were improper. This court has stated, “A lawyer should not assert his personal opinion as to the credibility of a witness, or as to the guilt or innocence of an accused.” Lackey v. State, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978) (citation omitted); see also State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). In this case, the State commented several times on the petitioner’s credibility, going so far as to state, “Now did the defendant lie? Repetitively.” This court has also said prosecutors “should avoid classification of the defendant as a ‘bad person’ who should be convicted on general principles for the good of society.” State v. McCary, 119 S.W.3d 226, 253 (Tenn. Crim. App. 2003) (citing Knight v. State, 229 S.W.2d 501 (Tenn. 1950)). Here, the State referred to the petitioner as a “very dangerous cat,” a “predator,” and a “disgusting individual.” Lastly, this court has stated that it is improper for the State to suggest during closing argument that jurors put themselves in the shoes of the victim. See State v. Ashburn, 914 S.W.2d 108, 115 (Tenn. Crim. App. 1995) (citation omitted). In this case, the State asked the jurors in graphic detail to view the case from the victim’s perspective. The State’s comments violated the principles set forth by this court in Goltz and were clearly improper. See Goltz, 111 S.W.3d at 6 (citing STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971)).

Trial counsel’s failure to raise the proper objections to the State’s remarks rendered her performance deficient. We cannot conclude, however, that the post-conviction court erred in finding that the petitioner was not prejudiced. On direct appeal, this court described the evidence against the petitioner as “overwhelming.” Alfonzo Thomas Peck, 2006 WL 223688, at *5. The victim and two witnesses positively identified the petitioner in a lineup. At the scene of the attack, three of the witnesses provided descriptions of the attacker that matched the petitioner. Furthermore, the petitioner testified that he owned a watch and a pair of eyeglasses that were found at the scene of the attack. Given this evidence and the conflicting defenses the petitioner presented at trial, the result of the proceeding would not have been different had trial counsel raised the proper objections. Likewise, we cannot conclude that the petitioner was prejudiced because appellate counsel failed to challenge the State’s closing argument on direct appeal. The petitioner did not show that the evidence preponderates against the findings of the post-conviction court, and therefore he is not entitled to relief.

CONCLUSION

Upon review, we affirm the judgment of the post-conviction court.

CAMILLE R. McMULLEN, JUDGE